STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 12, 2002

TO: ALL PARTIES OF RECORD IN RULEMAKING 02-01-011

Decision 02-12-027 is being mailed without the Dissent of Commissioner Carl W. Wood. The dissent will be mailed separately.

Very truly yours,

Carol A. Brown
Interim Chief Administrative Law Judge

Attachment

Decision 03-02-035 February 13, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Verification, Consolidation, and Approval of Costs and Revenues in the Transition Revenue Account.	Application 98-07-003 (Filed July 1, 1998)

ORDER MODIFYING DECISION (D.) 02-07-032, FOR PURPOSES OF CLARIFICATION, AND DENYING REHEARING, AS MODIFIED

I. INTRODUCTION

On October 2, 2001, the Commission and Southern California Edison Company ("Edison") entered into a Settlement Agreement in Federal District Court (Central District of California, Case No. 00-12056-RSWL (Mcx)) that provides for the recovery by Edison of its underrecovered costs as measured by the starting balance in Edison's Procurement Related Obligation Account ("PROACT").[1] As of August 31, 2001, the starting balance of the PROACT was $3.577 billion. The Federal District Court approved the Commission-Edison Settlement Agreement ("Settlement Agreement") on October 5, 2001.

In 2001, we adopted several surcharges to help the utilities address the financial difficulties arising from energy crises that began in the summer of 2000. Those surcharges are reflected in the generation component of utility bills. Pursuant to our prior orders, direct access ("DA") customers receive a credit on their bills for the entire

[1] See generally, Resolution E-3765 (January 23, 2002), pp. 1-13, for an explanation of what constitutes the costs in the PROACT.

We note that there is a pending application for rehearing of this resolution. Our reference to Resolution E-3765 is not intended as a disposition or a prejudgment of the rehearing application.

generation component. As a result of the crediting, only bundled service customers contributed to the recovery of the PROACT balance. On January 8, 2002, Edison filed a request in Application (A.) 98-07-003 ("Post PX DA Credits") for authority to establish an Historical Procurement Charge ("HPC") in order to adjust the credit that DA customers receive so that DA and bundled service customers would make equivalent contributions to the recovery of its underrecovered costs in the PROACT.[2]

In Decision (D.) 02-07-032, we authorized Edison to establish an HPC and apply it to DA customers by reducing the DA customers' generation credit from their otherwise applicable tariff ("OAT") by 2.7 cents/kWh until we issued a decision regarding a DA cost responsibility surcharge ("DA CRS").[3] At that time, the DA customers' credit would be reduced to 1.0 cent/kWh until Edison collected $391 million. D.02-07-032 states the above approach will ensure bundled customer indifference in the collection of the PROACT.

Also, in D.02-07-032, we found that since June 3, 2001, Edison has credited DA customers with the generation component of their OAT. This has resulted in DA customers avoiding the surcharges adopted in 2001 on a prospective basis and making no contributions to costs in the PROACT, while Edison's bundled service customers have been paying and continue to pay these costs. As a result, DA customers have not contributed to Edison's PROACT costs in the same manner as or at equivalent levels to bundled service customers. (D.02-07-032, p. 25 [Findings of Fact Nos. 1 & 2].)

Similarly, since September 1, 2001, Edison has received positive revenues from bundled service customers toward reducing the PROACT balance, while DA customers have contributed nothing to the recovery of the PROACT costs to which they contributed. (D.02-07-032, p. 35 [Finding of Fact No. 3].) Edison's payments and debts

[2] The HPC represents DA customers' share of underrecovered costs (e.g. Edison's stranded costs) in the PROACT account. (See Resolution E-3765 (January 23, 2002), p. 13.)

[3] We issued our decision regarding the DA CRS in D.02-11-022, rehearing denied in D.02-12-027. (See D.02-11-022, pp. 17-18 (slip op.), for a discussion regarding the HPC.)

relating to the PX credits equal $391 million; and the HPC was designed to recover $391 million from DA customers, which is their share of unrecovered costs in Edison's PROACT. (D.02-07-032, pp. 21.) Further, in D.02-07-032, we determined that: the HPC was reasonable and that the PROACT balance should be recovered from retail customers, including DA customers. (D.02-07-032, pp. 6-7.)

The following entities filed timely Applications for Rehearing of D.02-07-032: (1) the Alliance for Retail Energy Markets, Kroger Co., Los Angeles Unified School District, Sempra Energy Solutions, the University of California, California State University and the Western Power Trading Forum (collectively, "AREM"); (2) the Federal Executive Agencies ("FEA"); (3) The Utility Reform Network ("TURN"); and (4) the Newark Group ("Newark").

AREM raise the following challenges to the decision: (1) The Commission lacks authority to implement the HPC, and the imposition would violate Public Utilities Code Sections 368 and 453; (2) the decision is contrary to the express terms of the Settlement Agreement; (3) the finding regarding DA customers' contribution to Edison's PROACT costs is not supported by the record evidence; (4) the decision violates the prohibition on retroactive ratemaking as set forth in Public Utilities Code Section 728; (5) in setting the initial HPC, the Commission has failed to show that this action is consistent with its announced policy of continuing the economic viability of DA, to provide adequate notice and due process, and to develop an evidentiary record supporting the charge at a 2.7 cents/kWh level; and (6) the decision violates fundamental principles of equity and fairness. In its rehearing application, AREM also request clarification regarding payment and exemptions of the HPC regarding returning DA customers and CARE and medical baseline customers, and concerning the 1.0 cent/kWh surcharge reduction.

In its rehearing application, FEA alleges the following legal error: (1) the Commission exceeded its authority in that D.02-07-032 permits recovery of past costs in violation of Public Utilities Code Sections 368, 451 and 728; (2) the interim decision is not supported by the findings; (3) the imposition of the HPC is a violation of the Due

Process and Equal Protection Clauses of the 5th and 14th Amendments of the U.S. Constitution and Article 1, Section 7 of the California Constitution; (4) charging federal DA customers an HPC for electricity they consume violates the Supremacy Clause in that the imposition of the HPC is in conflict with established Congressional policy; and (5) the HPC violates the Intergovernmental Immunity Doctrine based on the Plenary Powers Clause regarding the direct contracts which provide for the delivery of electricity to areas under the exclusive jurisdiction of the federal government.

TURN asserts the following legal error: (1) D.02-07-032 incorrectly found that bundled service and DA customers made unequal contributions to Edison's historical undercollection; (2) the interest rate for the HPC account is inadequate to protect bundled customers, and is contrary to the Commission's policy of protecting bundled ratepayers from cost-shifting; and (3) the adoption of a DA surcharge cap is not supported by any evidence.

Newark argues that the Commission erred by imposing the HPC on uniquely positioned customers, like itself, who allegedly did not contribute to Edison's historical undercollection and who were forced to take electricity from a DA provider. Newark also filed a petition to intervene in the proceeding, and also, a petition for modification in case the Commission rejected its rehearing application. The petition for modification raises the same issues.[4]

Edison, AREM and Newark filed responses. Edison supports TURN's application for rehearing, while AREM oppose it. Edison also opposes the other three applications for rehearing. Newark joins the rehearing applications filed by AREM and FEA.

[4] Edison also filed a petition for modification of D.02-07-032 on October 16, 2002, which raises issues concerning the amount of the PROACT costs that DA customers are responsible for, the interest rate for the HPC, and the level of the HPC. Resolution of this petition for modification is pending, and in this order disposing of the applications for rehearing of D.02-07-032, we do not intend to prejudge or dispose of the issues raised in Edison's petition for modification.

On November 14, 2002, several members of AREM ("petitioner") filed a petition for writ of review in the California Supreme Court (Case No. S111239).[5] On November 27, 2002, the Commission asked the Court to hold the petition in abeyance until such time as the Commission issued its order on rehearing. The Commission noted that the petitioners had raised the same arguments in Court as it had in its application for rehearing. On December 18, 2002, the Court notified parties that S111439 would be held in abeyance until the Commission issues its order on rehearing.

We have carefully reviewed each and every argument raised by the applications for rehearing and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, we deny these applications for rehearing. However, as we explain below, we modify D.02-07-032 in several respects for the purposes of clarification. Also, in today's order, we will not address several issues for the reasons explained herein.

II. DISCUSSION

A. The Commission has the authority to authorize the HPC.

AREM argue that we lack statutory authority to implement the HPC. (See AREM's Application for Rehearing, pp. 3-5.)[6] Specifically, AREM assert that Assembly Bill No. 1 of the First Extraordinary Session ("AB 1X") Stats. 2001, 1st Ex. Sess., c. 4) does not provide the Commission with authority to impose the HPC. AREM further contend that AB 1X provides the Commission with only the limited authority to approve the collection of the Department of Water Resource's ("DWR") revenue requirement, suspend DA and, possibly, impose fees to collect DWR costs. These arguments are without merit.

[5] The following entities filed the petition for writ: the Regents of the University of California; the Alliance for Retail Energy Markets; Sempra Energy Solutions; and the Western Power Trading Forum.

[6] FEA also argues that the Commission lacks authority to permit Edison to begin charging DA customers the HPC. Its argument is based on allegations that the Commission has violated Public Utilities Code Sections 368, 451 and 728. (FEA's Application for Rehearing, p. 6.) These allegations have no merit for the reasons discussed in this order.

In regulating public utilities, we have broad authority to set just and reasonable rates and charges for utilities, as well as determine how costs will be recovered. (See, e.g., Cal. Const., art. XII; Pub. Util. Code, §§451, *et seq.*, 701 & 728.) This broad authority has been liberally construed. (See Consumers Lobby Against Monopolies v. Public Util. Comm'n (1979) 25 Cal.3d 891, 905.) Most of our regulation has been based on cost-of-service principles. Under cost-of-service regulation, the utility is entitled to all of its reasonable costs and expenses, as well as the opportunity to earn a rate of return on the utility's rate base, which is the original cost of the property devoted to public service minus the depreciation. (See Pacific Tel. & Tel Co. v. Public Util. Comm'n (1965) 62 Cal.2d 634, 644.) We determine reasonable depreciation for the utility and have used different methods for determining the amortization periods for depreciation expenses. (Id. at pp. 665-666.)

In exercising our regulatory authority, the Commission issued a plan to restructure the electricity industry into a competitive market. One of the aims of the restructuring was the unbundling of costs and providing an opportunity for retail end use customers of the utilities to receive electricity from other suppliers than their local distribution company. (See Preferred Policy Decision [D.95-12-063, as modified by D.96-01-009] (1996) 64 Cal.P.U.C.2d 1 & 228.) With the enactment of Assembly Bill No. 1890 ("AB 1890") (Stats. 1996, ch. 854), the Legislature codified many of the aspects of the Commission's efforts to restructure the electricity industry.

The thrust of AB 1890 was to subject the generation of electricity to competition. (See, e.g., Pub. Util. Code, §§ 330(e), (k), (l) (2) & 377 (as added by AB 1X).) It was believed, however, that certain generation assets owned by the utilities would not be economically viable in a competitive market. AB 1890 therefore provided for a transition period for the California electric utilities to recover their "transition costs" or "stranded costs" associated with their above-market generation-related costs. (See Pub. Util. Code, § 330, subd. (s) ("reasonable transition period [for] those costs and categories of costs for generation-related assets and obligations, including costs associated with any subsequent renegotiation or buyout of existing generation-related

contracts. . . that may not be recoverable in market prices in a competitive generation market"). We were charged with determining these "uneconomic" generation-related costs, and the utilities were provided an opportunity to recover these costs in the transition period that would end no later than March 31, 2002. (See Pub. Util. Code, §§ 367, 368, subd. (a).)

This transition never was completed. Beginning in the summer of 2000 and accelerating in December 2000, wholesale prices for power skyrocketed and California faced an energy crisis. In January 2001, in response to significant, unprecedented increases in power, California's investor-owned utilities, including Edison, incurred increased costs for electricity. Eventually, the financial ability of these utilities to purchase power for their customers was seriously affected, and the State was forced to step in to procure power to keep the lights on.

As a result of this energy crisis, the Legislature enacted AB 1X and Assembly Bill No. 6 of the First Extraordinary Legislative Section ("AB 6X") (Stats. 2001, 1st Ex. Sess., ch. 2). AB 1X authorized the California Department of Water Resources ("DWR") to purchase power on behalf of all retail end-use customers of these utilities and also authorized the Commission to allocate the DWR incurred costs among retail end-use customers, including DA customers. (See Water Code, §§ 80100, et seq.) AB 6X (effective January 18, 2001) amended Sections 216, 330 and 377 of the Public Utilities Code. The Legislature in AB 6X fundamentally changed the restructuring scheme established by AB 1890 in the following ways: 1) it eliminated the provision for market valuation of the utilities' retained generation ("URG"); 2) it prohibited the sale of any URG until January 1, 2006; and 3) it changed the Commission's authority over URG and eliminated the need for a transition period. In view of these fundamental changes, we determined in D.01-10-067 that amounts in retail customer bills for a utility's retained generation should be on a cost-of-service basis. This included generation under the control of the utilities through contracts. (D.01-10-067, pp. 9-11 (slip op.).)

The Settlement Agreement involved issues derived from the failed attempts to restructure the electricity industry into competitive markets in generation. The

objective of the restructuring was to move from cost-of-service regulation to market-based pricing of generation. Because of the electricity crisis, this transition was never accomplished. As described above, AB 1X and AB 6X, which were enacted to address the crisis, returned the Commission to cost-of-service regulation.

Based on the above discussion, we have broad regulatory authority over URG, including the recovery of costs which are related to URG and were previously referred to as stranded costs. AREM's interpretation of AB 1X is wrong in that this statute does not limit our authority to impose charges for the recovery costs resulting from the energy crisis from DA customers. AB 6X and our other regulatory powers, as described above, gives us the authority to allow for the recovery of those costs, including those set forth in Edison's PROACT account, from all retail end-use customers, including DA customers. Accordingly, we acted within our authority in authorizing the HPC in the manner we did in D.02-07-032.

B. The Commission's adoption of the HPC does not violate Public Utilities Code Section 368(a).

In their rehearing application, AREM argue that the imposition of the HPC violates Public Utilities Code Section 368(a) because the HPC is a charge for recovery of uncollected costs incurred prior to the end of Edison's rate freeze. According to AREM, Public Utilities Code Section 368(a) prohibits utilities from recovering after the end of the rate-freeze any undercollections incurred during the rate-freeze. AREM also contend that D.02-07-032 errs in relying on the Settlement Agreement in imposing the HPC because a state agency cannot subvert state law through entering into a private agreement. Finally, AREM assert that the federal district court's approval of the Settlement Agreement does not relieve us of our obligation to follow and enforce state law.

For the reasons we stated in D.02-11-026, AREM's post-rate-freeze debt recovery arguments are without merit. In that decision,[7] we explained: (1) Pursuant to

[7] Applications for rehearing of D.02-11-026 are currently pending. Our reference to D.02-11-026 is not intended to either dispose of these rehearing applications or to prejudge them.

Public Utilities Code Sections 451, 728, and 761, and notwithstanding the provisions of Public Utilities Code Section 368(a), the Commission is authorized to set rates at reasonable levels to ensure reliable electric service, and (2) AB 6X made the provisions in Public Utilities Code Section 368 (a) concerning recovery of uneconomic costs inapplicable, and, as the more recent statute, the AB 6X provisions control. (See D02-11-026, at pp.6 & 11-15 (slip op.).) Accordingly, our authorization of the HPC did not violate Public Utilities Code Section 368(a).

We note that the lawfulness of the Settlement Agreement was not an issue in the instant proceeding, and arguments related to this issue, even by inference, are not appropriately raised. Further, the issues concerning the lawfulness of the Settlement Agreement are currently before the California Supreme Court in Edison v. Lynch, Case No. S110662. The Ninth Circuit certified certain issues for review to this Court. Accordingly, we do not address them in this order.

C. The Commission did not violate Public Utilities Code Section 368(b).

In their application for rehearing, AREM claim that D.02-07-032 requires DA customers "to pay a non-energy rate component that is higher than the amount paid by bundled service customers for the same component" in violation of Public Utilities Code Section 368(b). (AREM's Application for Rehearing, pp. 6-7.) This claim has no merit.

Section 368(b) of the Public Utilities Code provides, in relevant part:

> "The cost recovery plan shall provide for the identification and separation of "individual rate components such as charges for energy, transmission, distribution, public benefit programs, and recovery of uneconomic costs. The separation required by this subdivision shall be used to ensure that customers of the electrical corporation who become eligible to purchase electricity from suppliers other than the electrical corporation pay the same unbundled component charges, other than energy, that a bundled service customer pays." (Pub. Util. Code, section 368, subd. (b).)

Contrary to AREM's claim, the HPC does not result in DA customers paying more for a non-energy component that is higher than the amount paid by bundled service customers for the same component. Rather, the HPC represents the DA customers' cost responsibility for costs that are part of the PROACT. This is a responsibility that DA customers have not contributed to until the authorization of the HPC. Bundled customers have been paying their share of the same component charge. We noted in D.02-07-032 that the DA customers' share would not be the same amount since they are not responsible in the same way for the costs in the PROACT. (D.02-07-032, pp. 2 & 12.) Thus, there is no violation of Public Utilities Code Section 368(b).

Further, in its rehearing application, AREM fail to demonstrate how requiring DA customers to pay their share of the costs in the PROACT is a violation of Public Utilities Code Section 368(b). They merely make a broad sweeping assertion that fails to support their claim that we have violated this statutory provision.

D. The Commission did not violate Public Utilities Code Section 451 in authorizing the HPC.

In their rehearing application, FEA alleges that we have violated Public Utilities Code Section 451 because the imposition of the 2.7 cents/kWh is unreasonable. Specifically, FEA argues that the HPC was not a contemplated cost in its decision to take DA service. Also, FEA asserts that the HPC has no basis in any determination of the prospective costs of Edison to serve DA customers. (FEA's Application for Rehearing, pp. 4-5.)

These allegations are without merit, and should be rejected. There is a rational relationship between the DA customers and the HPC. Based on evidence in the record, our determination to authorize the HPC is based on the cost responsibility of DA customers for Edison's PROACT costs, and the failure of DA customers to make contributions for recovery of these costs, which bundled service customers have been making. Thus, there was an inequity between DA customers and bundled service customers that we needed to rectify. Consequently, we adopted the HPC as the means to correct the inequity. (See D.02-07-032, pp. 5-6, 11-12. 18-20; 25 [Findings of Fact Nos.

1-3]; see also, discussion regarding the evidentiary record, infra.) These are reasonable bases for making the determination regarding the adoption of the DA CRS. Accordingly, the DA CRS is just and reasonable, and thus, consistent with Public Utilities Code Section 451.

The fact that the HPC did not exist when these customers decided to enter into their DA contracts does not mean the HPC is unreasonable. The cost responsibilities of DA customers are not frozen with their execution of their contracts. They are still responsible for costs that may be lawfully imposed. The HPC is one of these costs.

The HPC is not an adjustment to a previously approved rate; rather, it is a mechanism that authorizes the allocation and recovery of lawfully imposed costs. It also provides for correction of an inequity as between DA customers and bundled service customers. To determine otherwise would mean that we would permit one group of customers to escape their cost responsibilities while imposing those costs upon another group of customers. That would not be reasonable or fair.

E. The Commission did not violate Public Utilities Code Section 453.

AREM argue that the HPC violates Public Utilities Code Section 453. Specifically, they contend that the HPC would require DA customers to pay for generation twice, once to their ESP and once to Edison. They also allege that DA customers who return to bundled service would be required to pay the HPC in addition to the D.01-06-054 surcharges imposed on bundled customers. (AREM's Application for Rehearing, p. 7.) These allegations are without merit.

Contrary to AREM's contention, DA customers will not be paying twice for generation. This is because Edison has given DA customers a credit. Until June 3, 2001, Edison credited DA customers with the same amount Edison incurred to procure energy for bundled service customers. (Edison's Response, p. 12.) Thus, there has been no discrimination or preferential treatment in violation of Public Utilities Code Section 453. In fact, and as discussed above, the purpose of authorizing the HPC was to correct

an inequity between DA customers and bundled customers in the recovery of costs in the PROACT.

In D.02-07-032, p. 16, we stated: "DA customers are obligated to pay a portion of the PROACT balance through the implementation of the HPC because the HPC is nonbypassable. DA customers returning to bundled service are still responsible for paying the HPC." Although not explained in their rehearing application, AREM make the inference that DA customer returning to bundled service will have to pay both the HPC and the PROACT costs. However, this is neither a requirement in D.02-07-032, nor an intended result.

The allegation of double recovery from returning DA customers is speculative. AREM offer no evidence in the record to demonstrate that this circumstances could or would happen; they merely make the unsubstantiated allegation to attempt to establish their discrimination or preferential treatment arguments. Thus, this speculation, and the underlying legal arguments it supports, is without merit.

However, we will clarify D.02-07-032 to prevent any such possibility. The clarification is set forth in an ordering paragraph in this order.

F. The Commission did not violate the prohibition against retroactive ratemaking.

In their application for rehearing, AREM argue that D.02-07-032 violates Public Utilities Code Section 728, which prohibits retroactive ratemaking. (AREM's Application for Rehearing, pp. 16-17.) AREM argue that the HPC proposal is an impermissible retroactive adjustment of an unreasonable rate. Thus, AREM argue that HPC constitutes retroactive ratemaking. (AREM's Application for Rehearing, pp. 16-17.)

FEA makes a similar argument. (FEA's Application for Rehearing, pp. 5-6.) FEA argues that imposing the HPC involves historical procurement costs and thus has no bearing on future procurement costs to serve DA customers. Accordingly, FEA asserts that the authorizing of the HPC violates the prohibition against retroactive ratemaking

that is set forth in Public Utilities Code Section 728. (FEA's Application for Rehearing, pp.5-6.)

The retroactive ratemaking arguments made by both AREM and FEA have no merit. As we explain above, we have the legal authority to authorize the HPC. The amounts that are to be recovered through the HPC represent under-recovered stranded costs that have been previously booked in balancing accounts, which were transferred to the PROACT as a result of the Settlement Agreement. (See generally, Resolution E-3765 (January 23, 2002), for an explanation of the PROACT.)[8] As recorded, the costs were subject to prospective recovery from customers. Thus, the HPC is not adjusting a previously adopted rate; rather it concerns the allocation between bundled customers and DA customers of the previously recorded costs in the PROACT, and the recovery of such costs. Thus, there is no "ratemaking" and consequently, no retroactive ratemaking. Accordingly, the prohibition against retroactive ratemaking does not apply.

As the California Supreme Court has noted: The prohibition only applies in the situation when the Commission is "promulgating 'general rates' ". (Southern California Edison Company v. Pub. Utilities Com. (1978) 20 Cal.3d 813, 816.) Further, the California Supreme Court has concluded that although the effect may be retroactive, our decision to further adjust a fuel adjustment clause "so as to compensate for substantial past overcollections" does not constitute retroactive ratemaking. (Id. at pp. 829-830.)

[8] As noted in Resolution E-3765 (January 23, 2002), p. 13:

> "One of the accounts, which [Edison] proposes to eliminate, is its Transition Cost Balancing Account ("TCBA"). In D.01-03-082, the CPUC transferred all of [Edison's] underrecovered procurements costs to its TCBA, which provided for their full recovery but correspondingly reduced on a dollar-for-dollar basis [Edison's] recovery of its transition or stranded costs. This left a large balance of underrecovered stranded costs in [Edison's] TCBA. Section 2.8 of the Settlement eliminates the balance in [Edison's] TCBA as of August 31, 2001. Thus, [Edison] had already recovered its procurement costs through the revenue credits in the TCBA, and the effect of the Settlement is to recover the large stranded cost balance in the TCBA. Therefore, in essence, [Edison's] stranded costs will now be recovered in [Edison's] PROACT account under the Settlement's catch-all name of "Procurement Related Obligations", because the TCBA balance has been eliminated. For this reason, there is no longer any need for [Edison's] TCBA."

Similarly, the HPC does not constitute general ratemaking. Rather, in D.02-07-032, we are only allocating costs by assigning cost responsibility of DA customers for their fair share of the costs recorded in the PROACT. Contrary to AREM's allegation, D.02-07-032 does not involve a retroactive adjustment of an existing rate. The HPC concerns costs, and the allocated recovery of costs arising from the Settlement Agreement that were recorded in the PROACT. Further, recovery of such previously recorded costs from DA customers will be applied and collected prospectively. Thus, the adoption of the HPC does not constitute retroactive ratemaking that is prohibited by Public Utilities Code Section 728.

G. The Commission did not violate any fundamental regulatory principles.

Based on the above claims, AREM argue in their rehearing application that D.02-07-032 violated fundamental regulatory principles, including those involving ratemaking. (AREM's Application for Rehearing, pp. 17-18.) Specifically, they support this argument by alleging: (1) DA customers are paying twice for generation; (2) the HPC is overly burdensome and inconsistent with the Commission's recognition of the benefits of DA to the California economy and electricity market and the policy of the Commission and AB 1890 to preserve the viability of DA; (3) DA customers did not contribute to Edison's procurement-related debt and should not be required to pay for that debt, and thus, the imposing the HPC on DA customers is unfair and discriminatory and amounts to an improper tax and not a rate or charge; and (4) the imposition of the HPC violates our long standing principle of regulatory certainty. (AREM's Application for Rehearing, pp. 17-18.)

AREM's argument is based on incorrect premises. As we discuss here, there is no double recovery for generation, and DA customers did contribute to the costs in the PROACT and thus, are responsible for paying their share of the PROACT. (See also, D.02-07-032, pp. 11-12.) The allegation that we are not concerned about the viability of DA and acted inconsistent is factually wrong. In the decision, we noted our concern for the viability of DA and regulatory certainty when we expressed our objective

to prevent "pancaking" of surcharges that may lead to DA becoming uneconomic. (D.02-07-032, pp. 22 & 24.) But this concern was balanced with our regulatory duty to make sure "bundled customers [did] not pay more than their fair share of costs." (D.02-07-032, p. 22.) In the decision, we properly balanced these two objectives and determined that the HPC shall be 2.7 cents/kWh for all DA customers and be reduced to 1 cent/kWh should a DA CRS be imposed. (D.02-07-032, p. 23.) Thus, we did not violate any fundamental regulatory principles.

H. The HPC is consistent with the express language of the Settlement Agreement.

AREM argue that the HPC is inconsistent with the express language of the Settlement Agreement for the following reasons. First, AREM maintain that because the Settlement Agreement does not explicitly state that Edison can recover PROACT costs from DA customers, we have no basis to authorize the HPC. Second, AREM argue that, except for one line item, Schedule 1.1 only lists costs in the PROACT that relate to bundled service customers. Third, AREM maintain that the Settlement Agreement only authorizes recovery of amounts listed on Schedule 1.1 and not amounts Edison claims it paid in DA credits prior to the establishment of the PROACT. (AREM's Application for Rehearing, pp. 9, 11 & 12.)

AREM's arguments lack merit. The Settlement Agreement authorizes Edison to recover certain costs reflected in the PROACT balance from retail end-use customers. The PROACT balance, that already has been verified by the Energy Division, includes both the credits already paid to DA customers prior to January 5, 2001, (through the bank loan and other line items on Schedule 1.1) and the negative (credit) bills that Edison has accrued but not yet paid to DA customers utilizing ESP Consolidated billing (through the "ESPs" line item on Schedule 1.1). (See Exh. 105: Jazayeri/Edison, Response to Question 7, Data Request (2nd Set) from California Large Energy Consumer Association ("CLECA").) Further, we have authorized the PROACT in Resolution E-3765 (January 23, 2002). Accordingly, D.02-07-032 is entirely consistent with the

Settlement Agreement and, therefore, there is no validity to AREM's arguments that the express language of Settlement Agreement does not support D.02-07-032.

AREM also argue that DA customers are retail customers of ESPs, because ESPs and not Edison procure energy on their behalf. (AREM's Application for Rehearing, pp. 9-10.) Thus, AREM argue that D.02-07-032 errs in authorizing Edison to recover PROACT costs from DA customers because the Settlement Agreement explicitly provides that Edison is to recover those costs from its retail customers. Contrary to AREM's assertion, DA customers are retail customers of Edison. In Rule 1 of Edison's tariffs, "customers" is defined as including DA customers. This tariff rule also defines DA customers as end-use customers, which are retail customers. (See Edison's Tariff Schedules Applicable to Electric Service, Rule 1, Sheet 3 [Cal. PU.C. Sheet No. 28654-E].) Further, Edison has other tariffs treating DA customers as retail customers. (See generally, Edison's Tariff Schedules Applicable to Electric Service, Schedule DA [Cal. PUC Sheet NO. 32743-E], Schedule DA-RCSC (Revenue Cycle Services Credit) [Cal. PUC Sheet NO. 25153], and Rule 22 [Cal. PU.C. No. 31055-E].)

AREM also argue that Public Utilities Code Sections 331(c), 370 and 451 support their position that DA customers are retail customers of ESPs, and thus, are not subject to the provisions of the Settlement Agreement regarding the PROACT. (AREM's Application for Rehearing, p. 10.) Those statutory provisions do not support AREM's claims.

Public Utilities Code Section 331(c) defines the term "direct transaction" as a "contract between any one or more generators, marketers, or brokers of electric power and one or more retail customers providing for the purchase and sale of electric power…". (Pub. Util. Code, §331, subd. (c).) Public Utilities Code Section 370 sets forth the requirement that consumers engaging in direct transactions pay certain costs "directly to the electrical corporation providing electricity service in the area in which the consumer is located". (Pub. Util. Code, §370.) Public Utilities Code Section 451 sets forth the requirement that utilities charge just and reasonable rates for commodities and services. (Pub. Util. Code, §451.) These provisions do not support AREM's argument

that DA customers are only retail customers of ESPs and not Edison. Thus, AREM's reliance on these provisions is misplaced, and thus, their argument lacks merit.

Moreover, the DA credit liabilities are costs in the PROACT. (See Settlement Agreement, Schedule 1.1; see also Resolution E-3765, authorizing the PROACT.) Thus, AREM's argument that the Settlement Agreement only authorizes Edison to recover PROACT costs from its bundled service customers lacks merit.

Further, AREM argue that the Settlement Agreement authorizes recovery "without further retail rate increases" for bundled service customers and that D.02-07-032 errs in that the HPC constitutes a rate increase on DA customers. (AREM's Application for Rehearing, p. 11.) Through this argument, AREM are asserting by inference that bundled service customers are not paying their share of the PROACT costs. This assertion is wrong. Bundled service customers are already paying down the PROACT through the surcharges we adopted starting in January 2001 pursuant to D.01-03-082 and D.01-05-064. DA customers have avoided paying those surcharges because they are credited with the generation rate component of their OAT (which includes those surcharges). In fact, the purpose of the HPC is to ensure that DA customers also fulfill their obligation in paying down their portion of PROACT costs by lowering the credit paid to DA customers and contributing to the PROACT balance. Thus, there is no merit to AREM's argument that the HPC constitutes an increase for DA customers.

Further, contrary to AREM's allegation, the HPC is not a rate increase. Rather, the HPC, as we discuss in this order, is an allocation and assignment of costs that has been previously recorded in the PROACT. By authorizing the HPC, we are merely assigning the costs for which DA customers are responsible.

I. AREM's arguments concerning the WPTF Stipulation Agreement lack merit.

AREM argues that D.02-07-032 ignores evidence in the record that Edison voluntarily assumed the risks of negative credits when it entered into the WPTF

Stipulation[9] and that that constitutes an insufficient record. (AREM's Application for Rehearing, p. 13-5.) That argument lacks merit. The issue of who bore the risk of rising market prices is irrelevant. Rather, what is relevant is whether the DA customers are responsible for paying a share of the costs in the PROACT. Independent of what the Settlement Agreement or the WPTF Stipulation state, we based our determination to authorize the HPC on the record before us that supports our determination that the DA customer should pay a share of the PROACT.

Also, AREM maintain that there is no basis in the record for determining DA credit liabilities because the WPFT Stipulation permitted Edison to keep its data and calculations secret. (AREM's Application for Rehearing, p. 14.) As we discuss below, there is a sufficient basis in the record for determining DA liabilities and thus AREM's argument lacks merit. Moreover, none of the entities in AREM, or any other party to the proceeding, sought to compel that information from Edison through the discovery process. Thus, AREM cannot argue now that the record is incomplete when it had the opportunity to seek the information but failed to do so.

J. D.02-07-032 is supported by the record.

AREM argue that there is no evidence in the record to support the authorization of the HPC and setting of the initial HPC at 2.7 cents/kWh and that, because there is no evidence, our decision must be reversed. (AREM's Application for Rehearing, p.13 & 19.) Contrary to AREM's allegation, there is record evidence to support the authorization of the HPC and setting of the initial HPC at 2.7 cents/kWh.[10]

[9] Pursuant to that agreement, Edison eliminated the zero minimum bill provision from its tariffs and agreed to provide DA customers with negative (credit) bills if the energy credit exceeded the DA customer's total utility charges in exchange for ESPs dropping demands to see the inputs Edison used to calculate the monthly energy credits. (See D.99-06-058, pp. 16-17 (slip op.).)

[10] In its rehearing application, FEA also raises the issue of insufficient findings of fact and language explaining the Commission determination to authorize the HPC. FEA makes this argument without any specificity. (FEA's Application for Rehearing, p. 6.) Thus, we reject the argument for failing to comply with Public Utilities Code Section 1732 and Rule 86.1 of Commission's Rules of Practice and Procedure, tit. 20, §86.1. (See discussion, infra.)

The following from the record supports the Commission's authorization of the HPC and the adoption of the initial HPC at 2.7 cents/kWh:

- In its testimony, Edison explained how the PROACT balance also includes unrecovered costs that Edison incurred in order to pay DA credits. For example, Edison stated that unpaid credit bills that resulted from market energy prices in excess of its generation figures are reflected in Schedule 1.1 of the Settlement Agreement as a PROACT cost; further, the amounts Edison borrowed to pay the credit bills prior to January 5, 2001, or to purchase energy for current DA customers while they received bundled service, are reflected in other line items of Schedule 1.1. (Exh. 101: Jazayeri/Edison, pp. 10-11 & Appendix A; see also Reporter Transcript ("RT") Vol. 9, pp. 620-621, Jazayeri/Edison.)[11]
- Edison provided a numerical example that shows how DA and bundled service customers contributed to Edison's PROACT costs. (Exh. 101: Jazayeri/Edison, pp. 9-10.)
- In testimony, TURN stated that the HPC was designed to recover the costs recorded in Edison's PROACT from DA customers, in addition to the recovery that Edison was already receiving from bundled service customers. (Exh. 110: Florio/TURN, p. 2.) TURN supported the adoption of the HPC stating that only "[b]undled service customers [had] been making a contribution toward paying off the accrued undercollection ever since retail rates were increased and power costs decrease[d]" in June 2001 and that DA customers had "made no such contribution to date". (Exh. 110: Florio/TURN, p. 5.) TURN also stated that during months when the PX credit exceeded customers' total bills, the result was a credit balance due to the DA customers and that some of those credits had not been paid by Edison, but were listed in Schedule 1.1 of the settlement as costs that would be

[11] See also, Edison's Opening Brief Regarding its HPC, filed February 13, 2002, pp. 4-5 and Edison's Reply Brief in Support of its HPC, filed February 20, 2002, pp. 3.

paid off through the recovery of the PROACT. (Exh. 110: Florio/TURN, p. 5, fn 1.)

- The Settlement Agreement provides for Edison's recovery of the costs set forth in the PROACT. Edison's unrecovered costs as of August 31, 2001, were set forth in Schedule 1.1 of the agreement. (Settlement Agreement, Section 2.1(a).) The Settlement Agreement also shows that PROACT costs include: (a) negative (credit) bills Edison accumulated as a result of the market energy prices in excess of Edison's generation rate and (b) the amounts Edison borrowed to pay the credit bills prior to January 5, 2001,[12] or to purchase energy for current DA customers while they received bundled service during all or a part of the period when Edison accumulated its PROACT costs.
- The Settlement Agreement details how Edison is to recover PROACT costs from its retail customers. For example, Section 2.2 provides that Edison recover costs recorded in the PROACT. (See also, provision I.E.1. of the Stipulated Judgment to the Settlement Agreement.)
- The costs in the Edison PROACT have been verified, including costs relating to the payment of DA credits. (Exh. 101: Appendix B containing Letter, dated November 2, 2001, from the Director of the Energy Division verifying the costs in the PROACT, as of August 31, 2001, reflected in Schedule 1.1 of the Settlement Agreement; see also generally, Resolution E-3765 (January 23, 2002), approving the PROACT.)
- In testimony, Edison offered a range for an interim HPC from 2.38 cents/kWh for domestic customers to 2.738 cents/kWh for street light customers. (Exh. 102: Table V-1.)
- In testimony, Edison set forth a methodology for calculating the HPC. First, Edison amortized the

[12] That is the date Edison stopped issuing refunds for negative (credit) bills to customers on ESP Consolidated Billing.

PROACT balance, with interest, over two years. Then Edison allocated the annual revenue requirement for the HPC to individual customer groups based on each group's contribution to Edison's PROACT costs. Third, Edison divided each group's allocation for the total HPC revenue requirement by 2002 sales forecasts for that customer group to calculate the HPC. Through that methodology, Edison established a system-wide average HPC of approximately 2.5 cents/kWh. (Exh. 101: Jazayeri/Edison, pp. 13-15.)

- In testimony, TURN stated that it did not object to Edison's approach to calculating the HPC and that "there [was] likely more than one reasonable way of calculating the charges." (Exh. 110: Florio/TURN, p. 6.)
- Also, the Settlement Agreement provides for the recovery of the PROACT costs "as rapidly as possible. . . consistent with the terms" of the agreement. (Settlement Agreement, Section 2.9; emphasis added.)
- In testimony, Edison stated that pursuant to the Settlement Agreement, the accounting of "total revenues minus authorized costs . . . (Surplus) are booked to the PROACT account." Edison explained that bundled service customers contribute to the Surplus and that since the HPC will reduce the credit DA customers receive, it will increase the revenues and the amount booked to the PROACT, expediting recovery of the balance. (See Exh. 101: Jazayeri/Edison, p. 14, fn. 4.)
- In testimony, Edison also stated that the lower credit DA customers would receive would be consistent with its current weighted average energy cost, evidenced by the Surplus that bundled service customers contributed toward the recovery of the PROACT balance, and still represent a system average DA credit of about 8.5 cents/kWh. (Exh. 101: Jazayeri/Edison, p. 14.) Also, Edison testified that DA customers were currently receiving a credit of about 11 cents/kWh "which [was] significantly above the [prevailing] market prices". (RT Vol. 9, p. 617, Jazayeri/Edison.)

- In testimony, CLECA and the California Manufacturers and Technology Association ("CM&TA") expressed their concern about how the level of HPC could affect the viability of DA. (See Exh. 107: Barkovich/CLECA and CM&TA, p. 19-20.) Similarly, 7-Eleven expressed similar concerns in its testimony. (Exh. 108: Mrlik/7-Eleven, p. 5.)

Based on the above, there is adequate evidence in the record that supports our determination to authorize the HPC that assigns DA customers responsibility for a share of the costs in the PROACT and to authorize the HPC at 2.7 cents/kWh. Further, our determination to set the initial level of the HPC at 2.7 cents/kWh represented a reasonable weighing of the evidence in the record. In arriving at our determinations in D.02-07-032, we have balanced those public interest concerns that were raised in the record. Thus, our determinations in D.02-07-032 met the objectives for determining and assigning cost responsibility to DA customers of the costs in the PROACT, which had only been collected from bundled service customers, ensuring that the PROACT be paid off as quickly as possible, and in assuring the viability of the DA. Even though DA customers objected to Edison's HPC proposal that ranged between 2.38 and 2.738 cents/kWh, we were not convinced that either Edison's proposal or the 2.7 cents/kWH figure that we adopted would pose harm to the viability of DA. In any event, the HPC was set at this level as an interim measure only.

Moreover, in authorizing the HPC at 2.7 cents/kWh, we acted reasonably, and our action was not arbitrary or capricious. Courts have said we can exercise broad discretion in allocating costs. (See, e.g., Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n (1965) 62 Cal. 2d 634, 647; Wood v. Pub. Util. Comm'n (1971) 4 Cal. 3d 288, 294-295; and Market St. R. Co. v. Railroad Comm'n (1944) 24 Cal. 2d 378, 393, aff,d by 324 U.S. 548 (1945).) Therefore, in authorizing the HPC at 2.7 cents/kWh, we acted within our broad regulatory authority and drew reasonable factual inferences. Thus, AREM's argument with respect to the sufficiency of the evidence lacks merit.

We note that TURN also challenges the sufficiency of the evidence with respect to the 2.7 cents/kWh, but TURN calls it a cap for the total surcharge level.

(TURN's Application for Rehearing, pp. 6-7.) TURN is incorrect since the record cited above supports the Commission's determination of the HPC at 2.7 cents/kWh. In responding to TURN's arguments, Edison agrees that there is insufficient evidence for the 2.7 cents/kWh cap. However, Edison notes that the issue of the cap will be reconsidered in R.02-01-011. (Edison's Response, p. 3.) In D.02-11-022, we adopted an interim 2.7 cents/kWh for the total surcharge level for all DA CRS costs, which includes the 1 cent/kWh HPC. There, we also ordered reconsideration of that DA CRS interim cap. (See D.02-11-022, pp. 166-167 [Conclusion of Law Nos. 21-25] (slip op.); see also, Administrative Law Judge's Ruling Scheduling Further Proceedings Regarding the DA CRS Cap, dated January 24, 2003, pp. 1, 7-8 & 10.)

Accordingly, we need not address TURN's challenge regarding the cap because the 2.7 cents/kWh cap involving the total surcharges imposed on DA customers has been considered and, as discussed above, is being reconsidered in R.02-01-011. Further, in that proceeding, we will consider the issue concerning the appropriate interest rate for any financing of the cap by bundled customers. (See Administrative Law Judge's Ruling Scheduling Further Proceedings Regarding the DA CRS Cap, dated January 24, 2003, p. 7.)

K. Issues concerning the contribution of DA customers and bundled service customers to the PROACT and the interest rate for the HPC are currently being addressed in a pending proceeding.

In its rehearing application, TURN also challenges the determination concerning the contribution of DA customers to the costs in the PROACT and the interest rate that was adopted for the HPC. (TURN's Application for Rehearing, pp. 2-5.) Currently, there is a pending proceeding that will address these issues. In that proceeding, we will be reconsidering, among other matters, issues regarding what amount should be recovered from DA customers through the HPC, and what interest rate to use for the HPC. (See Edison's Petition for Modification of D.02-07-032, dated October 16, 2002, p. 1; Administrative Law Judge's Ruling on the Petition of Southern California Edison Company to Modify Decision 02-07-032; and Supplement to the Administrative

Law Judge's Ruling of November 26, 2002 on the Petition of Southern California Edison Company to Modify Decision 02-07-032, dated December 12, 2002, in A.98-07-003.) Hearings on those matters have been set for March 4 and 5, 2003. (Administrative Law Judge's Ruling Setting a Hearing on the Petition of Southern California Edison Company to Modify Decision 02-07-032, dated January 13, 2003, A.98-07-003.) Because these issues are currently being considered in this pending proceeding, we need not and do not address these rehearing issues in today's order.

L. The Commission's adoption of the initial HPC at 2.7 cents/kWh is consistent with its policy regarding the viability of DA.

AREM argue that the initial HPC of 2.7 cents/kWh is inconsistent with our announced policy of continuing the economic viability of DA. This argument lacks merit.

AREM are incorrect in stating that the HPC is inconsistent with our past policy. In D.02-07-032, we stated that in establishing the HPC we were "mindful of the likelihood that DA customers [would] also be subject to cost responsibility surcharges relating to DWR power purchases and potentially other costs, in R.02-01-011". (D.02-07-032, p. 22.) We also expressed concern that "the 'pancaking' of surcharges…[could] lead to DA contracts becoming uneconomic."[13] (D.02-07-032, p. 12.) Further, we stated that while we were "committed to ensuring that bundled customers do not pay more than their fair share of [PROACT] costs", we did "not wish to eliminate the DA market through injudicious imposition of charges" and would design charges to meet both objectives of paying down the PROACT and maintaining the DA market. (D.02-07-032, p. 22.) Moreover, we stated that we designed the HPC "to collect more money up front while no surcharges from R.02-01-011 [were] in place" in order to "allow DA customers to face a lower overall surcharge burden during the period when both surcharges [the

[13] By "pancaking", we referred "to the layering of one surcharge on top of another… similar to a stack of pancakes". (D.02-07-032, fn. 7.)

HPC and whatever surcharge came out of R.02-01-011 were] in effect." (D.02-07-032, pp. 22-23.)

M. Contrary to AREM's argument, the Commission afforded parties an adequate opportunity to be heard on the adoption of the initial HPC at 2.7 cents/kWh.

AREM argue that the Commission did not provide adequate due process because parties had only three business days to comment on the 2.7 cent/kWh initial charge. (AREM's Application for Rehearing, p. 19.) We reject this argument because AREM fail to provide any legal basis for their due process argument. Accordingly, they fail to establish a violation of the law because the Commission did not err in not providing the parties with a longer commenting period.[14]

We believe that the parties were given an adequate opportunity to comment on the alternate decision ("AD") proposing the initial HPC of 2.7 cents/kWh. The AD was mailed on July 3, 2002, and opening comments were due July 10, 2002 and reply comments were due July 15, 2002.[15] Parties, including members of AREM, filed comments. Those filings raised substantially similar issues as the instant rehearing. (See, e.g., Alliance for Retail Energy Markets' Opening Comments, filed July 10, 2002, pp. 4-6; University of California and the California State University's Opening Comments filed July 10, 2002, pp. 1-3; Kroger Co.'s Opening Comments, filed July 10, 2002, pp. 2-4; Los Angeles Unified School District's Opening Comments, filed July 10, 2002, pp. 2-5; Los Angeles Unified School District's Reply Comments, filed July 15, 2002, p. 2.) Thus, the parties were given an opportunity to be heard, and thus, were afforded due process.

[14] Further, we reject their due process argument because AREM have failed to comply with Public Utilities Code Section 1732 and Commission's Rules of Practice and Procedure that require that rehearing applicants must set forth their arguments with specificity. (See Pub. Util. Code, §1732; Code of Regs., tit. 20, §86.1; see also, discussion, infra.)

[15] The parties had 7 calendar days to file opening comments, and 5 calendar days to file reply comments, to the AD that proposed the initial 2.7 cents/kWh for the HPC.

N. In authorizing the HPC, the Commission did not violate any due process or equal protection provisions of the federal and state constitutions.

In its rehearing application, FEA argues that we have not complied with the law, and thus, have acted arbitrarily and capriciously in violation of FEA's due process and equal protection rights under the U.S. Constitution and the California Constitution. (FEA's Application for Rehearing, p. 7.) FEA presents this argument broadly and fails to provide any specificity or analysis. Accordingly, we reject its argument as failing to comply with the requirements of Section 1732 of the Public Utilities Code. This statute requires: "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. . . ." (Pub. Util. Code, §1732.)

Further, this argument does not comply with Rule 86.1 of our Rules of Practice Procedure, which states:

> "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission." (Code of Regs., tit. 20, §86.1.)

Even if we were to address the argument, it has no merit since we acted lawfully in authorizing the HPC, as we discuss in our order.

O. Contrary to FEA's assertions, requiring federal government agencies that are DA customers to pay the HPC does not violate federal law and is not inconsistent with federal policy.

In its rehearing application, FEA asserts that charging federal DA customers an HPC for electricity they consume violates the Supremacy Clause in that the imposition of the HPC is in conflict with established Congressional policy. FEA further

asserts that the HPC violates the Intergovernmental Immunity Doctrine based on the Plenary Powers Clause regarding the direct contracts that provide for the delivery of electricity to areas under the exclusive jurisdiction of the federal government. (FEA's Application for Rehearing, pp. 7-9.) These assertions have no merit.

In its analysis, FEA does not mention the federal law that requires federal government agencies to abide by state regulation in the procurement of electricity. Section 8093 of Department of Defense Appropriations Act of 1988, P.L. 100-202,[16] provides that:

> "[F]unds appropriated or made available by this or any other Act, . . . [may not be used] by any Department, agency , or instrumentality of the United States to purchase electricity in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements." (101 Stat. 1329-79.)

This requirement is found in 48 CFR §41.201. Thus, the federal policy and law requires agencies of the federal government in the purchase of electricity to comply with state law and the Commission's implementation of state law. Accordingly, our determination to impose the HPC on federal government agencies that are DA customers is not in conflict with federal policy. Thus, the Supremacy Clause and Plenary Powers Clause are not implicated. (See Louisiana Public Service Commission v. Federal Communication Commission (1986) 476 U.S. 355, 368-369 [Preemption does not apply if there is no actual conflict between federal and state law].)

Also, Congress has permitted state regulation of the purchases of electricity by federal government agencies. (See Hunt Building Corporation v. Bernick (2000) 79

[16]Section 8093 "is a general directive that federal agencies and installations follow state law in the procurement of their electric service. . . .[T]he legislative history clearly states that this legislation was intended to protect against utility abandonment by their federal customers." (West River Electric Assoc. Inc. v. Black Hills Power & Light Co. (8th Cir. 1990) 918 F.2d 713, 719.)

Cal.App.4th 213, 221.) "It is also clear that federal statutory provisions and regulations require that the Army must follow state law and regulations, including utilities regulations and franchise agreements, in its purchase of the commodity electricity. Pub.L. 100-202, § 8093; 48 C.F.R. §§ 41.201 (d) & (e)." (Baltimore Gas and Electric Company v. United States (D. Md. 2001) 133 F.Supp.2d 721, 738.) Interestingly, "[T]he legislative history [Section 8093] clearly states that this legislation was intended to protect against utility abandonment by their federal customers." (West River Electric Assoc. Inc. v. Black Hills Power & Light Co., supra, 918 F.2d at p. 719.)

FEA's reliance on Public Utilities Commission of California v. United States (1958) 355 U.S. 534, and similar cases, is misplaced. In that case, the statute that the Commission was implementing required it to approve the contract price negotiated by the federal agencies. (Id. at pp. 543-545.) However, in authorizing the HPC, we were not regulating the contract executed or the contract price negotiated by any federal government agency. The HPC is not made part of the contract. Rather, we were only exercising our regulatory authority to provide for the recovery of amounts in Edison's PROACT for which DA customers in the utility's service territory are responsible for paying their fair share. Under the federal law, U.S. governmental agencies are required to comply with D.02-07-032.

Further, the "Intergovernmental Immunity Doctrine" does not apply. As a matter of federal law, the federal government agencies must comply with state law in their purchase of electricity. Under Section 8093, there is no exemption from compliance with state law for electricity consumed on federal property.

P. D.02-07-032 will be modified for purposes of clarification.

In their rehearing application, AREM requested several clarifications: AREM state that D.02-07-032 should be clarified to state: "(1) returning direct access customers are not required to pay the HPC plus the full rates otherwise paid by bundled service customers; (2) the reduction to a one-cent/kWh surcharge will apply even if a direct access customer is not assessed direct access cost responsibility surcharges in

R.02-01-011; and (3) that CARE and medical baseline customers are exempted from the HPC." (AREM's Application for Rehearing, pp. 19-23.)

We believe that a clarification regarding what returning DA customers should be required to pay is appropriate to make sure that there is no double recovery with the payment of both the HPC and PROACT component paid by bundled service customers. We will add the following footnote after the fourth sentence of the second full paragraph on page 16 of D.02-07-032: "In developing tariffs for the collection of the HPC from returning DA customers, Edison should make the necessary adjustment so that there will not be double recovery from these customers."

In D.02-07-032, we determined: "Until a cost responsibility surcharge from R.02-01-011 is in effect, the HPC shall be 2.7¢/kWh for all DA customers. From that date on, the charge shall be 1.0¢/kWh until the $391 million is fully collected." (D.02-07-032, p. 23.) In its rehearing application, AREM request a clarification that the charge of 1.0 cent/kWh applies to all DA customers, even those who are not liable for the DA CRS. From the language of D.02-07-032, this is a logical conclusion and one that is not inconsistent with our determination in D.02-11-022 which lowered the HPC to 1.0 cent/kWh. (See D.02-11-022, p. 18 (slip op.).) However, it may not be clear that the 1.0 cent/kWh applies to all DA customers. Thus, to prevent any potential ambiguity, we will make that clarification. Thus, we will modify the second sentence in the first full paragraph on page 23 to read as follows: "From that date on, the charge shall be 1.0¢/kWh for all DA customers until the $391 million is fully collected." Also, we will modify Finding of Fact No. 12 to read as follows: "The HPC for all DA customers should be set at an initial level of 2.7¢/kWh, decreasing to 1.0¢/kWh when a cost responsibility surcharge is adopted in R.02-01-011 and continuing at 1.0¢/kWh until $391 million plus interest is collected, or until adjusted by the Commission."

The clarification regarding the exemption for CARE and medical baseline customers is unnecessary. In Resolution E-3790, we exempted residential usage below 130% of baseline, and CARE and medical baseline customers from the HPC. (Resolution E-3790 (November 7, 2002), pp. 1 & 6.)

Q. Newark's application for rehearing of D.02-07-032 is dismissed because it has no standing under Public Utilities Code Section 1731(b) to file the application.

Newark was not a party to the proceeding that resulted in the issuance of D.02-07-032. Thus, Newark does not have standing to seek rehearing of D.02-07-032. Public Utilities Code Section 1731(b) provides:

> "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing." (Pub. Util. Code, §1731, subd. (b).)

In its Petition for Intervention, p. 1, Newark sought "party status" to file the application for rehearing. It did not request any other status provided for in Public Utilities Code Section 1731(b) for the filing of its application for rehearing. Newark's petition for intervention and request for party status comes too late. Thus, we dismiss the rehearing application due to Newark's lack of standing.

However, we note that the arguments raised by Newark in its application for rehearing were addressed in D.03-01-011. In that decision, we rejected a petition for modification of D.02-07-032 that Newark had filed raising the same issues. In that decision, we stated:

> "Even if all the allegations of the petition were true they are irrelevant. We will not create exceptions to a tariff for specific customers or groups on the ground that they were not customers when a particular cost was incurred. Such exemptions are inappropriate. For example, any DA customer who started operation in Edison's service territory in the summer of 2001 could make a similar claim for exemption…Once the Commission adopts a billing factor, it becomes applicable to all customers, even those who were not taking service from the utility when the undercollections were actually incurred. To carve out special exemptions for special interests, will promote requests by various 'uniquely situated'

> customers who want to evade their obligations to pay the tariff." (D.03-01-011, pp. 1-2.)

However, our disposition of Newark's Petition for Modification of D.02-07-032 in D.03-01-011 does not change the fact that Newark had no standing to file its application for rehearing of D.02-07-032.

III. CONCLUSION

For the reasons discussed above, the applications for rehearing of D.02-07-032 are denied. However, D.02-07-032 should be modified for purposes of clarification, as ordered below. In addition several issues raised in the applications for hearing filed by TURN and AREM have been made moot by proceedings pending before the Commission.

THEREFORE, IT IS ORDERED that:

1. For purposes of clarification, D.02-07-032 will be modified as follows:

a. Page 16 is modified to add a footnote, after the fourth sentence of the second full paragraph of that page, with the following footnote text:

> "In developing tariffs for the collection of the HPC from returning DA customers, Edison should make the necessary adjustment so that there will not be double recovery from these customers."

b. D.02-07-032, p. 23, the second sentence in the first full paragraph on that page is modified, as follows:

> "From that date on, the charge shall be 1.0¢/kWh for all DA customers until the $391 million is fully collected."

c. D.02-07-032, Finding of Fact No. 12 is modified to read as follows:

> "The HPC for all DA customers should be set at an initial level of 2.7¢/kWh, decreasing to 1.0¢/kWh when a cost responsibility surcharge is adopted in R.02-01-011 and continuing at 1.0¢/kWh until $391 million plus interest is collected, or until adjusted by the Commission."

2. Rehearing of D.02-07-032, as modified, is denied.

This order is effective today.

Date February 13, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
Commissioner

I reserve the right to file a dissent.

/s/ CARL W. WOOD
Commissioner